(4)

No. 04-1055

APR 6 - 2005

In The
Supreme Court of the United States

SAFE AIR FOR EVERYONE,

Petitioner,

v.

WAYNE MEYER, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF IDAHO MEDICAL ASSOCIATION IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE* OF IDAHO MEDICAL ASSOCIATION IN SUPPORT OF PETITIONER

The Idaho Medical Association ("IMA") respectfully submits this brief in support of the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit filed by Safe Air for Everyone.[1]

I. INTEREST OF *AMICUS CURIAE*

The IMA is an organization of 1800 medical care professionals in Idaho, including 1600 practicing physicians, and also retired physicians, medical residents, physician assistants, nurse practitioners, and medical students. Since its founding in 1893, the IMA has taken a leadership role in public health and safety issues. The IMA has actively supported and served the Idaho medical community and fostered high quality care for all Idahoans through its leadership in legislation, medical education, and public health.

The IMA has a direct interest in this Court granting certiorari to review the Court of Appeals' decision that deprives Petitioners of the ability to use the Resource Conservation and Recovery Act to address the adverse health effects arising from bluegrass residue burning.

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[1] Pursuant to Rule 37.6 of the Rules of the United States Supreme Court, the IMA states that no counsel for any party authored this brief either in whole or in part. No person other than the IMA, its members, and counsel made any monetary contribution to the preparation or submission of this brief. Petitioner and Respondents have consented to the submission of this *amicus curiae* brief. Their letters of consent are being submitted with this brief.

Each summer, when bluegrass residue is burned in the fields of Northern Idaho, IMA members in the surrounding areas witness the suffering this practice causes. The burning poses a significant threat to the health of Idahoans, and a particular threat to the most vulnerable patients, including the very young and old, and those afflicted with chronic respiratory diseases such as asthma, cystic fibrosis, and emphysema. The adverse health effects caused by bluegrass residue burning are well documented in the record of this case, and responding to this threat falls squarely within the IMA's stated mandate of seeking to protect health and safety in the State of Idaho.

The IMA's duly elected Board of Directors has been authorized by the IMA to file this brief.

II. SUMMARY OF ARGUMENT

This Court should grant review to correct the appellate court's plain error in concluding that bluegrass residue left on a field and burned is not "solid waste" as defined under Resource Conservation and Recovery Act, 42 U.S.C. § 6903(27). This would both resolve a significant split among the circuit courts on the interpretation of a critical term used within the definition of solid waste – "discarded material" – and permit the Petitioners to proceed with their suit to protect the public health of Northern Idaho from the imminent and substantial endangerment residents suffer each year when the bluegrass fields are burned.

III. ARGUMENT

A. BLUEGRASS RESIDUE BURNING TRIGGERS A HEALTH CRISIS IN NORTHERN IDAHO EACH SUMMER.

The Petitioners amply documented in the district court the heavy burden the residents of Northern Idaho bear each year when the bluegrass fields are burned. IMA members such as the doctors who testified at the preliminary injunction hearing witness this burden in their offices and emergency rooms as the smoke sets off respiratory crises for the young, the old, and people of all ages with respiratory diseases such as asthma, emphysema, and cystic fibrosis. Evidence presented in the district court attributes at least three recent deaths to bluegrass burning.

The public health crisis caused by bluegrass burning is a regular event in Northern Idaho. IMA's core mission is to protect public health. Accordingly, we ask the Court to grant the writ of certiorari, review the Court of Appeals' decision, and restore to the Petitioners the ability to use the Resource Conservation and Recovery Act to prevent an imminent and substantial endangerment to public health.

B. BLUEGRASS RESIDUE FALLS WITHIN THE PLAIN MEANING OF "SOLID WASTE" IN THE RESOURCE CONSERVATION AND RECOVERY ACT.

The decision of the Court of Appeals turns on its elaborate parsing of the term "solid waste." No such parsing is called for in this case, because bluegrass residue falls squarely within the plain meaning of "solid waste" as defined in the statute:

> The term "solid waste" means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and *other discarded material*, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining and *agricultural operations*. . . .

42 U.S.C. § 6903(27) (emphasis added). The statute provides no definition of "discarded material." However, the Petitioners presented evidence that the overwhelming reason that growers burn bluegrass residue is to get rid of it. Hence, the bluegrass residue is "discarded" within the ordinary use of that word. Furthermore, it is clear from the plain language of the statute that solid waste includes "material resulting from . . . agricultural operations. . . ." 42 U.S.C. § 6903(27).

The Court of Appeals' strained and confusing analysis is unnecessary because bluegrass residue left on a field and burned is plainly "discarded material." This Court should grant review to correct this error and allow the Petitioners to proceed with their suit to protect the public health of Northern Idaho from the imminent and substantial endangerment residents suffer each year when the bluegrass fields are burned.

C. THE COURT OF APPEALS' DECISION CREATES A SPLIT AMONG THE CIRCUITS ON THE INTERPRETATION OF THE CRITICAL STATUTORY TERM, "DISCARDED MATERIAL."

The Court of Appeals did not stop at the plain meaning of "discarded material." Instead, it grafted onto the statute an additional requirement, not grounded in the

statutory language or any accepted canon of statutory construction. It created a new requirement that "discarded material" be material that is *solely* discarded, and that has no other purpose except to be discarded, and held that if a material has any other use or purpose, it cannot be discarded material. Because it found that burning creates *some* benefit by fertilizing the ground, the Court held that bluegrass residue is not "discarded" but instead "beneficially reused." While this analysis clearly relies on an examination of how the bluegrass residue is handled, the Court nonetheless insisted that "the determination of whether grass residue has been 'discarded' is made independently of *how* the materials are handled." Pet. App. at A18, note 13.

The Court of Appeals' decision creates a loophole through which many materials could escape from regulation under the Resource Conservation and Recovery Act, a statute which was designed to be comprehensive in its protection of public health. Under this reasoning, one can imagine that a residue produced in an industrial process could escape regulation if it was "reused" by, for instance, landfilling to change a grade. According to the Ninth Circuit's analysis, the purpose of landfilling would trump the purpose of discarding, the residue could not be "discarded material," and RCRA would not apply. The Fourth Circuit faced similar facts in *Owen Electric Steel Co. of South Carolina v. Browner*, 37 F.3d 146 (4th Cir. 1994), and reached the opposite result, holding that slag used for road construction was solid waste within the meaning of RCRA, even though it was being "beneficially reused." This result highlights the conflict among the circuit courts created by the Ninth Circuit's decision in this case, which is set forth in detail in the Petition at pages 25-28.

The ability to bring a citizens' suit under the imminent and substantial endangerment provision of the Resource Conservation and Recovery Act is a critical tool for communities to protect themselves from threats to their health. By interpreting the term "discarded material" in a narrow manner that is inconsistent with the language and purpose of the statute and the decisions of other circuit courts, the Ninth Circuit has taken this tool out of the hands of the people of Northern Idaho.

IV. CONCLUSION

As argued by Petitioner, and supported by the foregoing additional reasons, we urge the Court to grant the Petition for a Writ of Certiorari and restore to Safe Air for Everyone the right to pursue its case.

Respectfully submitted,

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